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No. ....

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In The  
**Supreme Court of the United States**  
October Term, 1983

— o —  
ROBERT L. CAMPBELL, et al.,

*Petitioners,*

vs.

DEPARTMENT OF TRANSPORTATION;  
FEDERAL AVIATION ADMINISTRATION,

*Respondents.*

— o —  
**ON WRIT OF CERTIORARI TO THE  
FEDERAL CIRCUIT COURT OF APPEALS**

— o —  
**SUPPLEMENTAL APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI**

— o —  
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## TABLE OF CONTENTS

	Page
Opinion and Order .....	1
I Background .....	1
II. Prima Facie Case of Strike Participation .....	4
A. Hearsay Evidence .....	5
B. Continuation of the Strike .....	6
III. Unauthorized Absence .....	13
IV. Readmission to Agency's Facility .....	14
V. Procedural Error Contentions .....	18
A. Oral Reply .....	18
B. Command Influence .....	20
VI. Suspension .....	21
VII. Other Contentions .....	22
A. Consolidation .....	22
B. Ex Parte Communications .....	22
C. Adverse Inference .....	23



UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
ROBERT L. CAMPBELL, ET AL.<sup>1</sup>

v.

DEPARTMENT OF TRANSPORTATION

DOCKET NUMBER:  
DE075281F0674

**OPINION AND ORDER**

**I. Background**

Appellants were removed from their positions as Air Traffic Control Specialists, Denver Air Route Traffic Control Center, Longmont, Colorado. Their removals were based on charges of: (1) striking against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence (absence without leave or AWOL). Appellants, 54 in all, petitioned for appeal of their removals to the Denver Regional Office of the Board. The appeals were consolidated by the presiding official pursuant to 5 C.F.R. § 1201.36(b).

With respect to each appellant, the presiding official found in a consolidated initial decision rendered on October 7, 1982, that the agency charges were supported by a preponderance of the evidence and that the penalty of removal was appropriate. She therefore sustained the agency actions. However, as to appellant Russell S. Root, the presiding official found that because he had notified the agency that he was ready, willing, and able to return to work prior to receiving his removal proposal, his place-

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<sup>1</sup>All 54 appellants and their individual docket numbers are listed on the attached appendix.

ment by the agency in a non-duty, non-pay status during the removal notice period constituted an improper suspension. She ordered the agency to amend its records and to place appellant Root in a duty and pay status from August 8, 1981, the date he requested to be returned to work, until September 2, 1981, the effective date of his removal.

Appellants' petition for review of the initial decision is based on numerous contentions of harmful error by the agency and reversible error by the presiding official in sustaining their removals.<sup>2</sup> Also, the agency cross-petit-

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<sup>2</sup>Additionally, appellants filed a motion to strike the agency's submissions on review on the basis that the agency failed to file a notice of a change of its designated representative as, they assert, is required by 5 C.F.R. § 1201.31(a). They further assert that a February 2, 1982 Prehearing Order by the presiding official stated that the Board would not accept submissions from any person other than the designated representative or a *pro se* appellant.

While the Prehearing Order applied only to proceedings before the presiding official, the Board has held that the procedures for the designation of representatives as provided in 5 C.F.R. § 1201.31(a) are applicable in petitions for review before the Board. See *Riddick v. Office of Personnel Management*, 5 MSPB 263 (1981). We consider appellants' motion to strike as the equivalent of a request for a sanction against the agency for failing to comply with section 1201.31(a). Before imposing a sanction, however, the Board's practice is to provide the affected party an opportunity to comply with the regulation in question. Since, in this case, the agency was not afforded such an opportunity, the Board finds that the imposition of a sanction would be inappropriate. Moreover, in response to appellants' motion, the agency cured its defective filing by submitting a proper notice of change of representative. Also, we note that appellants have not shown any resulting prejudice to their rights. Therefore, appellants' motion to strike is denied.

Appellants also filed a motion to dismiss the agency charges on the basis that the notice of proposed removal was

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ions for review from the presiding official's finding that it improperly suspended appellant Root. We hereby GRANT review under 5 U.S.C. § 7701(e) (1).<sup>3</sup>

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issued contrary to law. Appellants have cited no authority to support the granting of that motion on the basis alleged. We find that the appropriate procedure for challenging any error in the notice of proposed removal is by petition for review, as has been filed by appellants. Therefore, appellants' motion to dismiss is also hereby denied.

<sup>3</sup>By notice published in the Federal Register, 48 Fed. Reg. 2235-36 (1983), the Board solicited *amicus* briefs on issues of law common to numerous appeals of former air traffic controllers. In response to that notice, a total of some 11 *amicus* briefs were filed, and all have been duly considered by the Board in its decision-making process.

In a letter to the Board dated March 7, 1983, Rex B. Campbell, the designated representative for appellant Robert L. Campbell, et al., alleged that Special Presiding Official Kenneth Goshorn and agency representative Diane R. Liff engaged in an *ex parte* communication regarding the agency's motion to file a response to the *amicus* briefs. Because the charge involved a Board employee, it has been carefully investigated by the Board's Designated Agency Ethics Officer, Evangeline W. Swift. See 5 C.F.R. § 1201.103(b) (2).

Having examined Mr. Campbell's correspondence, Special Presiding Official Goshorn's Summary of Telephone Calls of February 23-24, 1983, and the Board order of March 17, 1983, granting the agency motion, the Ethics Officer has determined that the subject of the telephone communication in question was procedural in nature, and did not relate to the merits of a Board appeal or otherwise violate Board rules. She therefore concluded that it did not constitute a prohibited *ex parte* communication under 5 C.F.R. § 1201.102. This conclusion was conveyed to Mr. Campbell by letter dated April 14, 1983. We concur in that determination. Thus, no sanctions under 5 C.F.R. § 1201.103(b) are warranted under these circumstances. All of the documentation relating to this charge of *ex parte* communication is included in the official administrative record of this case.

## II. Prima Facie Case of Strike Participation

In *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982), the Board stated that "[i]n a case, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike."<sup>4</sup> The Board further stated that the burden of going forward would then shift to the appellant to present evidence showing that he was without knowledge of the strike or that his absence from duty was due to some other factor. However, the agency bears the burden of ultimately proving by a preponderance of the evidence that the appellant had participated in the strike. *Id.*

In the instant case, appellants contend in their petition that the agency failed to establish a *prima facie* case of their participation in a strike against the United States Government. The presiding official found that the agency presented both documentary and testimonial evidence that appellants were AWOL during the strike and failed to report for their first regularly scheduled shifts subsequent to a 48-hour grace period granted by President Reagan on August 3, 1981.<sup>5</sup> She found that, except for appel-

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<sup>4</sup>This Board has previously taken official notice that a strike by air traffic controllers commenced on August 3, 1981, and continued through August 6, 1981. *Ketchem v. Department of Transportation*, MSPB Docket No. DA075281F0713 at 9 (May 28, 1982). Also, the Board found that the strike was unlawful under 5 U.S.C. § 7311 and 18 U.S.C. § 1918. *Id.* at 5.

<sup>5</sup>On August 3, 1981, at approximately 11:00 a.m., E.D.T., President Reagan announced that striking air traffic controllers

lant Root, appellants made no request to be returned to work. Further, the presiding official found that appellants failed to even allege a legitimate nonstrike-related reason for their absence. Therefore, she concluded that the agency had sustained its burden of proving strike participation and absence without leave.

### A. Hearsay Evidence

In arriving at that determination, the presiding official noted that the testimonial evidence on appellants' strike participation was presented by the Chief of the Denver Air Traffic Control Center, Ralph Kiss, who was without "firsthand knowledge" of the facts to which he testified, and that other agency officials with personal knowledge of the facts were present at the hearing. Nevertheless, relying on a line of Board cases holding that hearsay evidence may be admitted in proceedings before the Board,<sup>6</sup> the presiding official determined that the tes-

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who failed to return to work within 48 hours would be terminated. The agency interpreted the announcement to allow a "grace period" during which those who reported for work at their first scheduled shifts after August 5, 1981, were not removed. See *Schapansky, supra*, at 11 n.9, citing *Air Traffic Controllers Strike*, 17 Weekly Comp. Pres. Doc. 845 (August 3, 1981); and *PATCO v. United States Department of Transportation*, 529 F. Supp. 614 (D. Minn. 1982). In a series of General Notices (GENOTS), the agency also allowed for regular days off and absence for other legitimate reasons which could have affected the deadline for returning. GENOT 128 (August 5, 1981); and GENOT 141 (August 10, 1981).

<sup>6</sup>See *Borninkoff v. Department of Justice*, 5 MSPB 150 (1981), and federal court cases cited therein. See also *Kunick v. Department of the Navy*, MSPB Docket No. SE07528110102 (January 19, 1982); *Lee v. Department of the Interior*, 6 MSPB 561 (1981); *Davies v. Department of Agriculture*, 5 MSPB 291 (1981); *Green v. U.S. Postal Service*, 3 MSPB 403 (1980).

timony provided by Mr. Kiss was worthy of evidentiary weight since it "was generally consistent, was corroborated by documents within the appeal record, was subject to cross-examination, and was uncontradicted by appellants." Initial Decision at 14-15. Further, the presiding official noted that appellants failed to object to the hearsay testimony proffered at the hearing.

In their petition for review, appellants now challenge the presiding official's admission of the hearsay testimony. Appellants assert that they requested the agency to produce a witness, John Schmidt, who allegedly had first-hand knowledge of the leave cancellation procedures utilized by the agency, but that the agency failed to do so. Appellants also allege that the presiding official failed to order the agency to produce the witness. The record shows, however, that Mr. Schmidt did testify at the appellants' request. Hearing Transcript (Tr.) at 805-813. On consideration of the record, we find no error in the presiding official's decision to assign probative value to the hearsay testimony.

### **B. Continuation of the Strike**

Two appellants, David Gold and Thaddeus W. Wallace, were charged with strike participation commencing subsequent to August 6, 1981. The agency had initially charged appellant Gold with striking from August 13 to August 18, 1981, the date of the notice of his proposed removal, but thereafter conceded that appellant Gold was on a combination of approved annual leave, regular days off, and spot leave through August 16, 1981. Therefore, the agency amended the commencement date of appellant Gold's alleged strike participation to August 17, 1981. Ap-

pellant did not dispute the corrected agency deadline. He failed to report for his August 17, 1981 deadline.

Appellant Wallace was on approved annual leave and regular days off through August 12, 1981. His stated agency deadline was August 13, 1981. Appellant Wallace also failed to report for his agency deadline and was charged with strike participation from August 13, 1981, to August 19, 1981, the date of the notice of his proposed removal.

Both appellants challenge the presiding official's finding that the strike continued beyond August 6, 1981. The presiding official based her finding upon the following un rebutted evidence presented by the agency: media excerpts showing that leaders of the Professional Air Traffic Controllers Organization (PATCO) regarded the strike as continuing until as late as October 31, 1981; an October 28, 1981 submission made by PATCO before the Federal Labor Relations Authority (FLRA) concerning discontinuation of the strike;<sup>7</sup> and testimony by Mr. Kiss that picketing at the Denver facility continued until September 24, 1981, subsequent to the removal dates of all the appellants to this action. Tr. at 37.

In *Ketchem, supra*, at 9, the Board held that when an employee is charged with participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that the strike was in fact in progress on the date charged and that the employee could have returned to work on that date. We also held in

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<sup>7</sup>See *Professional Air Traffic Controllers Organization and Federal Aviation Administration*, 7 F.L.R.A. No. 10 at 2, footnote (November 3, 1981) (Supplemental Opinion of Ronald H. Haughton, Chairman).

*Noa v. Department of Transportation*, MSPB Docket No. NY075281F0697 at 14-16 (April 25, 1983), that in order to show continuation of the strike, the agency need not necessarily present evidence proving that on the charged date or dates there was a certain number of co-workers mutually withholding their services.

In consideration of the record, and in light of our discussion in *Noa, supra*, at 14-16, we find that it is more likely true than not true that the strike continued at least until August 17, 1981, when the last of three appellants (Wallace) could have returned to work. *Ketchem, supra*, at 9.

Further, the agency showed by testimonial evidence, as well as documentary evidence consisting of leave and attendance records, that both of these appellants were absent without authorization from the dates of their agency deadlines and had neither contacted the agency nor attempted to report for duty. Tr. at 373-80, 766-78. Therefore, we find that the agency established a *prima facie* case of strike participation by appellants Gold and Wallace on August 17 and 13, respectively. See *Schapan-sky, supra*, at 6 n.2. These appellants have failed to offer any evidence to rebut the agency's *prima facie* case by showing that they were without knowledge of the strike or that there was some other legitimate nonstrike-related reason for their absence. *Id.* Therefore, we find that the agency sustained its burden of proving by preponderant evidence strike participation by appellants Gold and Wallace.

It has been held that participation in a strike against the United States Government, however, "short-lived,"

justifies removal under 5 U.S.C. § 7311. *See American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1284 (9th Cir. 1982), *cert. denied*, 51 U.S. L.W. 3606 (February 22, 1983) (No. 82-575). Thus, having found that the agency showed by preponderant evidence strike participation by these appellants on August 13 and 17, we need not address allegations of their strike participation on subsequent dates.

The remaining appellants were charged with strike participation for all or a portion of the August 3-6, 1981 official notice period<sup>8</sup> until the issuance of their notices of proposed removal.<sup>9</sup> The agency presented testimonial and documentary evidence showing that each of these appellants was absent without authorization during the official notice period. *See* Tr. at 187-801. (These pages include the extensive testimony presented by the agency to show unauthorized absence by these appellants). Thus, under *Schapansky, supra*, at 6 n.2, the agency established a *prima facie* case of strike participation by these appellants.

Several appellants sought to rebut the agency's *prima facie* case of strike participation by contending that they were on approved annual leave for at least a portion of the period for which they were charged with striking and AWOL. With respect to those appellants, the agency presented documentary and testimonial evidence of their

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<sup>8</sup>See *Ketchem, supra*, at 9.

<sup>9</sup>In light of the court's holding in *American Postal Workers Union v. U.S. Postal Service, supra*, at 1284, we also find it unnecessary to address allegations of these appellants' strike participation subsequent to the official notice period.

annual leave cancellation prior to the commencement of the August 3, 1981 strike as follows:

*Michael A. Nord*

The agency submitted a "Record of Conversation" indicating that on August 2, 1981, appellant's supervisor left a message with appellant's wife that appellant's annual leave was cancelled. This evidence was buttressed by Mr. Kiss' testimony to that effect. Tr. at 629-633. Appellant has not denied he received notice of the leave cancellation. Appellant failed to report for his August 6, 1981 deadline.

*Shannon K. Redding*

The agency submitted a "Record of Conversation" by appellant's supervisor, indicating that appellant was personally notified on July 31, 1981, of her annual leave cancellation. See Tr. at 680. Appellant failed to report for her August 6, 1981 deadline.

*Russell S. Root*

The agency submitted a "Record of Conversation" signed by appellant's supervisor. The document stated that a telephonic notification of appellant's leave cancellation was communicated to appellant's wife on August 2, 1981, and that she agreed to forward the message to appellant. At no time has appellant denied receiving the message from his wife. Appellant simply alleges that the agency failed to prove that his wife had relayed the message of cancellation to him.

We note, though, that Mr. Kiss telephoned appellant on August 4, 1981, and requested that he return to work

but that appellant refused. It is undisputed that annual leave cancellation was not discussed on that occasion. We find that Mr. Kiss' explanation that he did not mention leave cancellation because he was aware appellant had already been notified of the cancellation and that he was merely encouraging appellant to return to work was plausible. *See* Tr. at 688, 692-93. Appellant failed to report for his August 5, 1981 deadline. He called the agency on August 8, 1981, requesting to be returned to work. He was informed that he had missed his deadline and would not be allowed to return.

*Darrell L. Taylor*

The agency submitted a "Record of Conversation" showing appellant's wife was informed telephonically on August 2, 1981, of appellant's leave cancellation and that she agreed to notify him.<sup>10</sup> Appellant has not alleged that his wife failed to notify him that his annual leave was cancelled. Appellant failed to report for his August 6, 1981 deadline.

*Thomas G. Weimer*

The agency submitted a "Record of Conversation" indicating that on August 1, 1981, appellant was notified in person by his supervisor that his annual leave was cancelled. *See* Tr. at 790-91. Appellant does not deny that his leave was cancelled. Appellant failed to report for his August 5, 1981 deadline.

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<sup>10</sup>Appellant challenges an agency statement in his file concerning cancellation of annual leave and regularly scheduled days off in the event of a strike as unsigned and undated. Appellant has not further identified that statement, and it is not evident from review of appellant's file.

Further, the record shows that all of those appellants, as well as the other appellants in this consolidation, had been informed by the agency that all annual leave would be cancelled in the event of a strike, and each appellant's file contains a July 31, 1981 memorandum of annual leave cancellation. Appellants have not denied receiving those general notices of leave cancellation. Thus, we find that the agency showed by preponderant evidence that appellants' leave was effectively cancelled. *See McPartland v. Department of Transportation, MSPB Docket No. DA-075281F1018 at 2-4 (February 8, 1983).*

Except for appellant Russell S. Root, none of the appellants, including those who alleged that they were on scheduled annual leave for a portion of the period during which they were charged with striking, even claimed that they attempted to contact the agency regarding their job status or to return to work pursuant to the Presidential amnesty offer. Further, none of the appellants charged with striking during the August 3 to August 6, 1981 period has alleged lack of knowledge of the strike or absence from duty due to some other factor. *See Schapansky, supra*, at 6 n.2. Therefore, we find that the agency met its burden of proving by preponderant evidence strike participation by these appellants. *Id.* *See also Ketchum, supra*, at 9.

With respect to the propriety of the penalty, appellants have not appealed from the presiding official's finding that removal was appropriate for their strike participation. In any event, in *Schapansky, supra*, at 10-11, the Board found that under *Douglas v. Veterans Administration*, 5 MSPB 313 (1981), the agency's imposition of a removal penalty on an air traffic controller cannot be deem-

ed clearly excessive or disproportionate to a sustained charge of striking against the Federal government.

### III. Unauthorized Absence

Appellants contend that the agency charge of unauthorized absence lacks specificity. They contend that the language, which they allege is identical in all cases except for the dates and times concerned, fails to clearly specify the period of AWOL.

Under 5 U.S.C. § 7513(b) (1), an employee against whom an adverse action is proposed is entitled to be informed of the specific reasons for the agency's proposed action. The information provided by the agency must be sufficiently specific to permit the appellant an opportunity to properly respond to the agency charge. *See Young v. Department of the Navy*, 7 MSPB 7, 10-11 (1981).

In this case, the AWOL charge as to each appellant alleges that, commencing on a specific date, the appellant failed to report for his scheduled tour of duty and has since remained absent without authorization. We find that the charge as alleged was sufficiently specific to apprise appellants of the reason for the charge and to provide them an opportunity to properly respond thereto. Further, as the presiding official noted, and the record clearly indicates, appellants' presentation at the hearing demonstrated that they understood the charges against them. *See Pinto v. Department of Labor*, MSPB Docket No. DE07528010140 (May 11, 1982); *Bize v. Department of the Treasury*, 3 MSPB 261 (1980). In view of the court's holding in *American Postal Workers Union v. United States*, *supra*, at 1284, that striking for any period of time

is cause for removal under 5 U.S.C. § 7311, we deem it unnecessary to address the agency's allegations of AWOL subsequent to the period for which we have found appellant's strike participation based on AWOL during the strike. We find that the evidence of unauthorized absence presented by the agency to establish appellants' strike participation likewise supports by preponderant evidence the charges of unauthorized absence for the same period.

#### IV. Readmission to Agency's Facility

Appellants allege that the agency's failure to inform them of their individual deadlines and ambiguities generated by the President's announcement and statements by the Secretary of Transportation<sup>11</sup> misled them into believing that they had already been discharged after the expiration of the Presidential grace period. They contend that under *NLRB v. Park Edge Sheridan Meat, Inc.*, 323 F.2d 956 (2d Cir. 1963), they were therefore not required to make a futile request to return to work. Appellants also rely on *Pennypower Shopping News, Inc.*, 253 N.L.R.B. 11, 105 L.R.R.M. 1433 (1980), and *Winn-Dixie Stores, Inc. v. NLRB*, 502 F.2d 1151 (4th Cir. 1974), in support of their contention. These cases address the legality of an employer's actions in "locking out" or discharging private sector employees engaged in protected

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<sup>11</sup>Indeed in *Ketchem, supra*, at 7-8, the Board quoted from Judge Green's holding in *United States v. PATCO*, 524 F. Supp. 160, 164 n.6 (D.D.C. 1981), noting the conflicting information resulting from "the multiplicity of the statements issuing from government officials and the contradictions and ambiguities that they involved."

strike activities under section 7 of the National Labor Relations Act.<sup>12</sup>

In the private sector, a "lockout," generally defined as "an employer's withholding of work from his employees in order to gain a concession from them,"<sup>13</sup> is unlawful when it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of some right protected by section 7 of the [National Labor Relations] Act."<sup>14</sup> *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 308 (1965). One of the rights conferred by section 7 of the Act upon private employees is the right to strike.<sup>15</sup> In circumstances where unlawful lockouts or discharges of private employees exercising the right to strike occur, the employers concerned have consistently been ordered to reinstate the affected employees with back pay. See *Pennypower Shopping News, Inc.*, *supra*, 105 L.R.R.M. at 1433-34; *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 5, 100 L.R.R.M. 1470, 1472 (1979); *Winn-Dixie Stores, Inc. v. NLRB*, *supra*, at 1151-52; *NLRB v. Park Edge Sheridan Meats, Inc.*, *supra*, at 959; *NLRB v. Valley Die Cast Corp.*, 303 F.2d 64, 66-67 (6th Cir. 1962); and *National Labor Relations Board v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 625 (2d Cir. 1957).

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<sup>12</sup>See 29 U.S.C. § 158.

<sup>13</sup>*Brandenburg v. Capital Distributors Corp.*, 353 F. Supp. 115, 119 (S.D.N.Y. 1972), quoting from Restatement of Torts § 787 comment a. See also *Laclede Gas Co. v. NLRB*, 421 F.2d 610, 615 n.9 (8th Cir. 1970).

<sup>14</sup>See 29 U.S.C. § 158(a) (1), (3).

<sup>15</sup>See 29 U.S.C. § 157.

Further, in the private sector, where ambiguities in the employment status of legally striking employees have been generated by illegal acts of the employers, the uncertainties have been resolved in favor of the striking employees. See *Winn-Dixie Stores, Inc., supra*, at 1151-52; *NLRB v. Park Edge Sheridan Meats, Inc., supra*, at 957-59; and *NLRB v. Valley Die Cast Corp., supra*, at 66-67. These cases stand for the proposition that, where the private sector employees reasonably believed they had been unlawfully discharged, they were not required to engage in the futile act of notifying their employers of their intent to abandon the strike and their desire to return to work. However, where no illegal acts had been committed by the private sector employers, such notification was required by the striking employees. *Abilities & Goodwill, Inc., supra*, 100 L.R.R.M. at 1471.

In contrast, Federal employees have no similar statutorily conferred right to strike, but rather are expressly prohibited from striking by 5 U.S.C. § 7311 and 18 U.S.C. § 1918. See *Ketchem, supra*, at 5. Similarly, in *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 882 (D.D.C.), *aff'd*, 404 U.S. 802 (1971), the Court noted the difference in treatment accorded public and private employers by Congress. The *Blount* court stressed that in the National Labor Relations Act of 1937, as well as the Labor Management Relations Act of 1947 (Taft-Hartley), the term "employer" was defined "as not including any governmental or political subdivisions, and therefore, indirectly withheld the protections of section 7 from governmental employees." Indeed, the Board is unaware of any instances in which the lockout principle, as applied in private sector cases, has been similarly ap-

plied in cases of prohibited striking under 5 U.S.C. § 7311 and 18 U.S.C. § 1918.

We find the private sector cases, upon which appellants rely to support their contentions of confusion and futility of notification, inapplicable to Federal employees engaged in an illegal strike under 5 U.S.C. § 7311 and 18 U.S.C. § 1918.<sup>16</sup> Any right by appellants, as illegally striking employees, to be readmitted to the agency's facility was specifically limited by the terms and conditions of the Presidential amnesty offer and subsequent interpretive directives issued by the agency. Thus, in order to be readmitted to duty, the appellants in this case were required to timely notify the agency of their availability and their desire to return to work on or before their next regularly scheduled tour of duty. Appellants could not properly have unilaterally expanded that limited right to include the right accorded legally striking employees to reasonably rely on confusion and the futility rule to relieve themselves of their responsibility of timely notification.

In any event, the futility rule employed in the private sector would nevertheless not apply in the instant case since the alleged confusion generated by the agency was not caused by any illegal acts on the part of the agency. *Abilities & Goodwill, Inc., supra*, 100 L.R.R.M. at 1471-72. Thus, we hold that despite any ambiguities and uncertain-

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<sup>16</sup>See *Bullock v. Mumford*, 509 F.2d 384, 388 (D.C. Cir. 1974), which holds that irrespective of "however valid the charge [by the strikers] may be, it does not excuse illegal and disruptive behavior." See also *Bennett v. Gravelle*, 323 F. Supp. 203 (D. Md.), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed*, 407 U.S. 917 (1972), *disapproved on other grounds*, *Sethy v. Alameda Co. Water District*, 545 F.2d 1157 (9th Cir. 1976).

ties caused by the President's announcement or statements by agency officials regarding appellants' employment status, it was incumbent upon appellants to timely notify the agency of their readiness and desire to return to work and to inquire as to their individual deadlines in order to qualify for returning to work during the President's grace period. Since appellants failed to so notify the agency, they were properly subject to removal.

## **V. Procedural Error Contentions**

Under 5 U.S.C. § 7701(c) (2) (A), the agency charges, although found supported by preponderant evidence, cannot be sustained where the appellant shows harmful procedural error by the agency in arriving at its decision. *See Parker v. Defense Logistics Agency*, 1 MSPB 489, 492-99 (1980). Appellants contend that the agency committed harmful procedural error in failing to provide them with 7 days for presenting an oral response to the agency charges as is required by 5 U.S.C. § 7513(b) (2). Appellants also contend that the oral reply process was rendered meaningless because the decision by the agency deciding official to remove them was based, not on his own independent judgment, but on the "command influence" of President Reagan and other high-level agency officials.

### **A. Oral Reply**

Appellants contend that because the agency in its notice of proposed removal required them to respond to the charges "within 7 calendar days," they were afforded less than 7 days to respond in violation of 5 U.S.C. § 7513 (b) (2), which requires "not less than 7 days" to respond

orally and in writing.<sup>17</sup> Appellants also contend that they were given less than 7 days for oral response because of the agency's denial of their request for an extension of time. However, appellants failed to raise these contentions before the presiding official. Therefore, they cannot be considered on review. See 5 C.F.R. § 115; *Banks v. Department of the Air Force*, 4 MSPB 342, 343 (1980).

Appellants further contend that the oral response process was reduced to a mockery since, they assert, the agency was aware that it would have been logistically impossible for it to accommodate the numerous oral replies contemplated. In this regard, appellants have not shown that the oral reply process was defective because of the agency's inability to fully consider or hear the large number of oral responses presented. Appellants merely assert that the agency committed procedural error in failing to schedule the response of each appellant, requesting instead that appellants' representative undertake that task.

Neither 5 U.S.C. § 7513(b) (2), which confers upon appellants the right to an oral reply to the agency charges, nor its implementing regulation, 5 C.F.R. § 752.404(c) (2), requires the agency to schedule oral responses. Appellants' representative failed to schedule the responses as requested. Agency official Kiss, designated to hear the

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<sup>17</sup>In *Schapansky, supra*, at 7-8, the Board held that, in light of the felony provision of 18 U.S.C. § 1918, the agency could invoke the crime exception of 5 U.S.C. § 7513(b) (2) to waive the 30-day notice period otherwise required by 5 U.S.C. § 7513(b) (1) where the agency had reasonable cause to believe that the employee had engaged in strike participation prohibited under 5 U.S.C. § 7311 and 18 U.S.C. § 1918. Appellants have not appealed from the pending official's finding that the crime exception was properly invoked in the present case.

oral replies, testified that the agency would have extended the oral reply period to hear appellants' responses. Since appellants failed to exercise their statutory right to an oral response by refusing to schedule the response time, appellants have failed to show procedural error by the agency in its handling of the oral response process. See *Parker, supra*, at 492-99.

### **B. Command Influence**

Appellants also contend that the "command influence" of President Reagan's announcement regarding the dismissal of air traffic controllers, who failed to report for duty during the grace period, precluded a meaningful consideration by the agency of appellants' responses to the agency charges. Appellants also allege "command influence" from the Secretary of Transportation and the Administrator of the Federal Aviation Administration. Appellants assert that the statements by those officials resulted in harmful procedural error since they precluded Mr. Ralph Kiss, the agency's deciding official, from acting independently in removing appellants.

In *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983), the Board held that neither the public statements of President Reagan and high level agency officials regarding the strike, nor the written communications from agency headquarters to the various facilities, impinged on the ability of deciding officials to exercise independent judgment regarding whether the charges in individual cases should be sustained, or in any manner deprived the appellants of a meaningful opportunity to reply to the charges on which their removals were based. Thus, appellants have not shown procedural error by the agency in this respect.

## VI. Suspension

Appellants have not appealed from the presiding official's finding that, except as to appellant Root, appellants were not suspended during the notice period. Therefore, that contention will not be addressed on review.

The agency, however, cross-petitions for review of the presiding official's determination that appellant Root was improperly suspended because, prior to receiving the notice of proposed removal, he notified the agency that he was ready, willing, and able to report for duty but was not allowed to return.

The Board held in *Martel v. Department of Transportation*, MSPB Docket No. BN075281F0558 at 11 (April 25, 1983), that in order to meet his burden of establishing jurisdiction over an alleged constructive suspension during the notice period under 5 C.F.R. § 1201.56(a) (2), an appellant must show by preponderant evidence that he contacted an agency official with decision-making authority and unequivocally communicated his availability and desire to return to work. The Board held that such a showing would establish that the appellant was ready, willing, and able to return to work. *Id.* The Board further held that the agency's admission that it nevertheless refused to readmit the appellant would be sufficient to show that the appellant's absence after his attempted return was involuntary and disciplinary in nature. *Id.*

It is uncontested that appellant Root telephoned his supervisor on August 8, 1981, prior to the issuance of the notice of his proposed removal and clearly requested to be returned to work. Tr. at 689, 691-92. It is also undisputed that appellant was informed by his supervisor that

appellant had missed his deadline and would not be allowed to return. *Id.* Thus, under *Martel, supra*, we find that appellant Root was erroneously suspended by the agency from August 8, 1981, until September 2, 1981, the effective date of his removal.

## **VII. Other Contentions**

### **A. Consolidation**

Appellants contend that the presiding official improperly consolidated these appeals despite their objections thereto. Under 5 U.S.C. § 7701(f) and 5 C.F.R. § 1201.36(b), the presiding official is authorized to consolidate cases on his or her own motion where to do so would result in more expeditious processing of the cases and would not adversely affect the rights of the parties. Appellants have contended neither that the consolidation failed to expedite processing nor that their rights were harmed thereby. Therefore, appellants have not shown error by the presiding official in this respect. *See Noa, supra*, at 3-5.

### **B. Ex Parte Communications**

Appellants also contend that the presiding official erred in refusing to find prohibited *ex parte* communications in public statements made by President Reagan and FAA Administrator Helms to agency officials with decision-making authority in these adverse actions. Appellants rely on 5 U.S.C. § 554(d) and *Camero v. United States*, 375 F.2d 177 (Ct. Cl. 1967), in support of this contention. Those authorities prohibit *ex parte* communications on facts in issue between decision-making officials and a party to the action.

The Board finds that the public statements made by President Reagan and FAA Administrator Helms cannot be deemed *ex parte* communications. Our regulations at 5 C.F.R. § 1201.101(a) explain that an *ex parte* communication is one made "between decision-making personnel . . . and an interested party to . . . [an adverse action] without providing the other parties a chance to participate." Since the statements in this case were public statements, appellants were not thereby excluded from participating fully in defending against their removal actions before the agency.<sup>18</sup>

### C. Adverse Inference

Appellants further contend that the presiding official erred in drawing an adverse inference from their failure to testify at the hearing. Appellants assert that the presiding official's reliance on *Book v. U.S. Postal Service*, 6 MSPB 322 (1981), *aff'd*, 675 F.2d 158 (8th Cir. 1982), was misplaced. Appellants argue that under *Book*, *supra*, the presiding official is required to request that the appellant testify; then, if the appellant declines, caution him that his silence could affect the credibility of his arguments even though he is not obligated to testify. Appellants allege that since they were not so warned, the presiding official erred in drawing an adverse inference from their failure to testify. There is no requirement in *Book* that the presiding official first warn an appellant

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<sup>18</sup>To the extent that appellants' argument in this record may relate to the issue of the effect of these public statements on adverse action procedures before the agency, the Board notes that *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983), resolves that issue adverse to appellants' position.

regarding the consequences of his failure to testify, and we find no error by the presiding official under *Book, supra*. See *Adams v. Department of Transportation*, MSPB Docket No. NY075281F0424 at 14-15 (April 25, 1983).<sup>19</sup>

Accordingly, the initial decision of the presiding official is hereby AFFIRMED.

The agency is hereby ORDERED to amend its records so as to place appellant Root in a pay status from August 8, 1981, to September 2, 1981, the effective date of his removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this Opinion. Any petition for enforcement of this Order

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<sup>19</sup>In their petition for review, and in a subsequent submission dated March 15, 1983, appellants allude to an April 21, 1982 research assistance memorandum from the Board's Office of General Counsel to the Board's then Acting Assistant Managing Director for Regional Operations. Appellants suggest that Board proceedings relating to the air traffic controller strike which commenced on August 3, 1982, were merely *pro forma*. The record in this case simply does not support this allegation.

The memorandum in question expressly stated that it was not intended to influence presiding officials' decisions. Presiding officials were not obligated to adopt the mode of analysis or the conclusions in the memorandum. In fact, presiding officials were cautioned to conduct their own legal research and to exercise independent fact-finding responsibility and judgment. The different findings on similar issues in the air traffic controller appeals evidence that presiding officials did undertake their own legal research and made independent fact findings. Nor can the memorandum be properly deemed to have been an "advisory opinion" issued by the Board in violation of 5 U.S.C. § 1205(g). The Board members did not consider or vote on the memorandum, and it can not in any way be construed as an expression of their views, collectively or individually. Nothing in 5 U.S.C. § 1205(g), or elsewhere, bars the Office of General Counsel from preparing research assistance memoranda.

shall be made to the Denver Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

April 25, 1983      /s/ HERBERT E. ELLINGWOOD  
    (Date)                      Chairman

April 25, 1983      /s/ ERSA H. POSTON  
    (Date)                      Vice Chair

April 25, 1983      /s/ DENNIS M. DEVANEY  
    (Date)                      Member  
Washington, D. C.